IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. RANDY ALLEN CRAWFORD, Defendant-Appellant.	)))))))))	S.CT. NO. 19-1506

APPEAL FROM THE IOWA DISTRICT COURT
FOR SCOTT COUNTY
HONORABLE HENRY W. LATHAM II, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

THERESA R. WILSON
Assistant Appellate Defender
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEY'S FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On the 20th day of July, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Randy Crawford, 1025 14 ½ St., Rock Island, IL 61201.

APPELLATE DEFENDER'S OFFICE

/s/ Theresa R. Wilson

THERESA R. WILSON
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us

TRW/lr/7/20

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions:

Statutes and Court Rules:

Other Authorities:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The concept of error preservation has little application to the constitutionality of Senate File 589's restrictions on ineffective assistance of counsel claims on direct appeal.

Authorities

State v. Pickett, 671 N.W.2d 866, 869 (Iowa 2003)

DeVoss v. State, 648 N.W.2d 56, 60 (Iowa 2002)

2019 Iowa Acts ch. 140 § 31

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

State v. Cooley, 587 N.W.2d 752, 754 (Iowa 2003)

State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994)

State v. Trane, 934 N.W.2d 447, 464 (Iowa 2019)

State v. Milner, 571 N.W.2d 7, 12 (Iowa 1997)

II. Senate File 589 runs afoul of the separation of powers, equal protection, due process, and the right to counsel.

A. Separation of Powers and Jurisdiction

Iowa Const. art. V, § 4

Stockwell v. David, 1 Greene 115, 117 (Iowa 1848)

Sherwood v. Sherwood, 44 Iowa 192, 195 (Iowa 1876)

State v. Briggs, 666 N.W.2d 573, 578 (Iowa 2003)

Iowa Const. art. V, § 4 (2019)

Iowa Const. art. V, § 6 (2019)

In re Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988)

Laird Brothers v. Dickerson, 40 Iowa 665, 670 (Iowa 1875)

Schrier v. State, 573 N.W.2d 242, 244–45 (Iowa 1997)

Dunbarton Realty Co. v. Erickson, 120 N.W. 1025, 1027 (Iowa 1909)

Tuttle v. Pockert, 125 N.W. 841, 842 (Iowa 1910)

Brenton v. Lewiston, 236 N.W. 28, 29–30, modified, 238 N.W. 714 (Iowa 1931)

Iowa Const. Art. V § 4 (1857)

Iowa Const. Art. V § 4 (1962)

Platt v. Harrison, 6 Iowa 79, 81 (Iowa 1858)

Cassandra Burke Robertson, The Right to Appeal, 91 N.C. L. Rev. 1219, 1237 (2013)

Documentary Material Relating to the History of Iowa, Vol. I, p.102, n.1 (Benjamin F. Shambaugh ed., 1897)

Organic Law of the Territory of Iowa, Sec.9 (1938)

Iowa Const. Art. 6, §§ 2-3 (1844)

Iowa Const. Art. 6, § 3 (1846)

Root v. Toney, 841 N.W.2d 83, 87 (Iowa 2013)

Scheid v. State, 211 N.W.2d 458, 462 (Wis. 1973) *overruled on other grounds* by State v. Van Duyse, 224 N.W.2d 603 (Wis. 1975)

Aetna Accident & Liab. Co. v. Lyman, 144 N.W. 278, 279-280 (Wis. 1913)

State ex rel. O'Connor v. Dist. Court In & For Shelby Cty., 260 N.W. 73, 78 (Iowa 1935)

Mr. Justice Deemer's "Iowa Pleading and Practice" at Vol.2, sec.1107

State v. Olsen, 162 N.W. 781, 782 (Iowa 1917)

Wissenberg v. Bradley, 229 N.W. 205, 209 (Iowa 1929)

Iowa Code ch. Courts, §§ 76–77, p. 124 (Terr. 1839)

Iowa Code ch. 47, §§ 76–77 (Terr. 1843)

Iowa Code ch. 47, §§ 3088, 3090–91 (1851)

Iowa Code § 4529 (1873)

Iowa Code § 9559 (1919)

Iowa Code §§ 13607, 13994 (1924)

Iowa Code § 762.51, 793.1 (1966)

Iowa Code § 793.1 (1973)

Iowa Code § 814.6 (1979)

1972 Iowa Acts, ch. 1124, §§ 73.1, 275, 282
(64th Gen. Assem., 2nd Sess.)

Iowa Code § 814.6 (1979)

Iowa Const. art. I § 11 (1857)

Iowa Const. Art I § 4

Iowa Code § 602.4102 (2019)

Iowa Code § 602.5103 (2019)

State v. Abrahamson, 696 N.W.2d 589, 593 (Iowa 2005)

B. Equal Protection

State v. Stoen, 596 N.W.2d 504, 507 (Iowa 1999)

State v. Milner, 571 N.W.2d 7, 12 (Iowa 1997)

Strickland v. Washington, 446 U.S. 668 (1984)

State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004)

C. Due Process

McKane v. Durston, 153 U.S. 684, 687–88 (1894)

Cassandra Burke Robinson, The Right to Appeal, 91 N.C. L. Rev. 1219, 1221 (2013)

Marc M. Arkin, Rethinking the Constitutional Right to an Appeal, 39 UCLA L. Rev. 503 (1992)

Alex S. Ellerson, The Right of Appeal and Appellate Procedural Reform, 91 Columbia L. Rev. 373, 376 (1991)

State v. Ohio ex. rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 80 (1930)

Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983)

Harlon Leigh Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 66 (1985)

ABA Comm. On Standards of Judicial Administration: Standards Relating to Appellate Courts § 3.10, at 12 (1977)

Griffin v. Illinois, 351 U.S. 12, 18 (1956)

Suzuki v. Quisenberry, 411 F. Supp. 113, 1133 (D. Haw. 1986)

Gregory M. Dyer, Criminal Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain, 65 Notre Dame L. Rev. 649, 651 (1990)

Rosanna Cavallaro, Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal, 72 U. Colo. L. Rev. 943, 986 (2002)

Reece v. Georgia, 350 U.S. 85, 90 (1955)

United States v. Cronic, 466 U.S. 648, 658 (1984)

STATEMENT OF THE CASE

COMES NOW Defendant-Appellant Randy Crawford, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on June 29, 2020.

While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address arguments regarding error preservation, jurisdiction, equal protection, and due process raised by the State.

ARGUMENT

I. The concept of error preservation has little application to the constitutionality of Senate File 589's restrictions on ineffective assistance of counsel claims on direct appeal.

Error preservation serves two basic principles: "(1) affording the district court an "'opportunity to avoid or correct error"'; and (2) providing the appellate court "'with an adequate record in reviewing errors purportedly committed"' by the district court." State v. Pickett, 671 N.W.2d 866, 869 (Iowa 2003)(quoting DeVoss v. State, 648 N.W.2d 56, 60 (Iowa

2002)). Neither principle is served by requiring error preservation in this case.

First, there was no error in the district court to correct. Until Crawford appealed his criminal conviction and decided upon his issues, the restrictions imposed by the new legislation had no application to him. See 2019 Iowa Acts ch. 140 § 31 (ineffective assistance of counsel claims shall not be decided on direct appeal from the criminal proceedings).

Second, there was no need to develop an additional record in the District Court to assist the appellate courts in assessing Crawford's claim. His claim is simply that his trial attorney was ineffective for failing to object to the sufficiency of the evidence. The factual record on the claim has already been developed. The appellate courts are fully capable of assessing whether the factual record establishes the legal elements for conviction – including when trial counsel has failed to properly challenge the sufficiency of the evidence. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004).

While not exactly analogous, a comparison to sentencing errors may be helpful. When a defendant is sentenced and the district court considers impermissible factors, the defendant is not required to object at that time because there are no procedures that permit the defendant to speak to the court after sentence is pronounced. State v. Cooley, 587 N.W.2d 752, 754 (Iowa 2003); State v. Thomas, 520 N.W.2d 311, 313 (Iowa Ct. App. 1994). Likewise, there are no procedures within a criminal case to allow a defendant to challenge the constitutionality of a statute that impacts only those claims he may be allowed to raise on direct appeal at a future time. Cf. State v. Trane, 934 N.W.2d 447, 464 (Iowa 2019)(motion for new trial is not the appropriate venue for litigating ineffective assistance claims).

The concept of error preservation has no application to the constitutional challenges Crawford raises in this appeal. He does agree, however, with the State's position that

constitutional claims raised on appeal are reviewed de novo. State v. Milner, 571 N.W.2d 7, 12 (Iowa 1997).

II. Senate File 589 runs afoul of the separation of powers, equal protection, due process, and the right to counsel.

A. Separation of Powers and Jurisdiction

Article V section 4 of the Iowa Constitution provides that the Iowa Supreme Court "*shall* have appellate jurisdiction only in cases in chancery, and" that in non-chancery cases it "*shall* constitute a court for correction of errors at law…." Iowa Const. art. V, § 4 (emphasis added). In this way, "the constitution has constituted [the Iowa Supreme Court] an appellate court in chancery, and a court of errors at law….". Stockwell v. David, 1 Greene 115, 117 (Iowa 1848). See also Sherwood v. Sherwood, 44 Iowa 192, 195 (Iowa 1876) ("This court has appellate jurisdiction only in cases in chancery, and is a court for the correction of errors in actions at law.") (citing Iowa Const. art. V, § 4). In understanding the jurisdiction thereby conferred by the Constitution upon the Iowa Supreme

Court, the distinction between an "appeal" (in chancery cases) and a review "for correction of errors at law" (in non-chancery cases) must be understood. See State v. Briggs, 666 N.W.2d 573, 578 (Iowa 2003) ("the changing understanding of… terminology from the time of our constitution's drafting to the present" must be considered when interpreting the words of the constitution).

Review for errors at law (also referred to as review on "a writ of error") is "of common law origin, and removes [to the Supreme Court] nothing for examination but the law", meaning the Supreme Court may correct legal errors "which appear of record" from the district court proceeding. Stockwell v. David, 1 Greene 115, 116-17 (Iowa 1848). In contrast, an "appeal"[1] "has its origin from the civil law", and

---

1. At one time Iowa statutes provided that "law actions were removed to the Supreme Court by writ of error, chancery cases by appeal." Sherwood v. Sherwood, 44 Iowa 192, 197 (Iowa 1876). But "Now writs of error are dispensed with and one course is pursued in bringing up all cases." Id.

"removes a cause entirely, subjecting the fact as well as the law to a review and new trial" in the Supreme Court "as if it had not been tried before…." Id. In this way, "an appeal secures to the party all the benefits of a writ of error" (correction of the inferior court's legal errors), "*as well as* [the additional benefit of] a hearing upon the merits…." Id. at 117 (emphasis added).

After providing the Supreme Court "*shall* have appellate jurisdiction only in cases in chancery, and" that in non-Chancery cases it "*shall* constitute a court for correction of errors at law…", the final clause of article V section 4 (preceding the semicolon) references the legislature's ability to enact certain prescriptions or restrictions. See Iowa Const. art. V, § 4 (2019) (", under such restrictions as the general assembly may, by law, prescribe"). A similar reference to legislative prescriptions is also included in Article V, § 6, pertaining to district court jurisdiction. See Iowa Const. art. V, § 6 (2019) ("…, in such manner as shall be prescribed by

law."). In understanding these references to legislative restrictions or prescriptions, it is important not to conflate the legislature's ability to reasonably prescribe or restrict the *manner* of jurisdiction with an ability to *remove* constitutionally conferred jurisdiction from the courts.

Subject matter jurisdiction is conferred upon Iowa's courts by the Iowa Constitution. In re Guardianship of Matejski, 419 N.W.2d 576, 577 (Iowa 1988). While the legislature can reasonably prescribe the *manner* of its exercise, it cannot *deprive* the courts of their constitutionally conferred jurisdiction. Id. ("Subject matter jurisdiction is conferred upon our district courts by our constitution."; "'The legislature may not *deprive* the District Court of its jurisdiction, nor, in the least, *limit* it; all that it is authorized to do is to prescribe the *manner* of its exercise.'") (quoting Laird Brothers v. Dickerson, 40 Iowa 665, 670 (Iowa 1875)) (emphasis added); Schrier v. State, 573 N.W.2d 242, 244–45 (Iowa 1997) (similarly stating).

The Iowa constitution (Article V § 4) confers on the Iowa Supreme Court jurisdiction over appeals and over correction of lower court errors, and the legislature can impose only reasonable restrictions and procedures which do not alter or destroy this fundamental character and function of the Supreme Court. See Stockwell, 1 Greene at 116 (Iowa 1848) ("The [Iowa] constitution has clearly defined the jurisdiction of this court, giving it upon the one side appellate jurisdiction in all cases in chancery, and constituting it, upon the other, a court for the correction of errors at law."); Dunbarton Realty Co. v. Erickson, 120 N.W. 1025, 1027 (Iowa 1909) (equity action; "It is true that our state Constitution (article 5, § 4) gives to the Supreme Court appellate jurisdiction in equitable cases", but legislature can impose "*reasonable* rules and regulations" concerning how an appeal shall be taken and the time within which the right may be exercised) (emphasis added); Tuttle v. Pockert, 125 N.W. 841, 842 (Iowa 1910) (equity action; legislature can prescribe procedure for appeal,

meaning trial de novo, and "The form of procedure is unimportant *if such right be not thereby destroyed*.") (emphasis added); Sherwood, 44 Iowa at 194 & 196 (Iowa 1876) (Legislature may enact "regulation affecting the manner of appeal" including "the proceedings necessary to be taken prior to an appeal"; however, once the legislature statutorily established divorce cases as chancery actions, it could not enact a statute that "deprives parties to [such] chancery actions *the right to trials in this [Supreme] court de novo [i.e., the right of appeal], a right secured by the constitution*"; "since the action of divorce is [statutorily established as] an equitable action, it comes to this court by appeal proper and is triable here anew, under the Constitution, *regardless of the general provisions of [the statute]*.") (emphasis added); Brenton v. Lewiston, 236 N.W. 28, 29–30, modified, 238 N.W. 714 (Iowa 1931) (law action; "The Legislature may impose restrictions as by limiting appeals by the amounts in controversy..., *but it may not, by the enactment of restrictions, so change the*

character of the court as that it shall be other in reviewing a law action than 'a court for the correction of errors at law.")
(emphasis added).

This understanding is reinforced by the second half of Article V section 4 (after the semicolon), which currently provides the Iowa Supreme Court "shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state." Iowa Const. art. V § 4 (2019). Originally, this provision stated only that the Supreme Court "shall have power to… exercise a supervisory control" over inferior courts. Iowa Const. Art. V § 4 (1857). But a 1962 amendment made explicit that the Supreme Court has not only a power but also a duty to exercise its supervisory (and now also administrative) control over inferior courts. Const. Art. V § 4 (1962) ("shall exercise a supervisory and administrative"). Pursuant to this language, the Supreme Court has both the inherent power *and the*

constitutionally conferred duty ("shall") to "exercise a supervisory and administrative control over all inferior judicial tribunals", including the "power to issue all writs and process necessary to secure justice to parties". Iowa Const. art. V, § 4. And (unlike the language preceding the semicolon), the powers and duties conferred upon the Supreme Court by this latter language is not qualified by the phrase "under such restrictions as the general assembly may, by law, prescribe." Id.

Consistent with this understanding, it appears that, at the time the Iowa Constitution was adopted, there existed in Iowa a right of review to the Iowa Supreme Court from lower court decisions – either by way of what was termed an 'appeal' (entailing a trial de novo in the Supreme Court) in chancery cases, or by way of what was termed a 'writ of error' (entailing review only for the correction of legal error) in non-chancery cases including those resulting in criminal conviction. Platt v. Harrison, 6 Iowa 79, 81 (Iowa 1858) (The review available

following conviction is "by appeal, or writ of error, and not by habeas corpus." Convicted persons have "a perfect, well defined, and complete remedy, in the regular and usual method of appeal"). This 'writ of error' review employed in Iowa for correction of legal error in the lower court "is of common law origin". Stockwell, 1 Greene at 117 (Iowa 1848). And such "'writ of error,' which facilitated the correction of legal error by a higher court, was allowed '*as a matter of right*' under English common law." Cassandra Burke Robertson, The Right to Appeal, 91 N.C. L. Rev. 1219, 1237 (2013) (emphasis added).

Indeed, it appears this right of review existed even during Iowa's time as a territory and that such right was then effectively incorporated into the Iowa Constitution upon Iowa's ascension to statehood. When Iowa was established as a

territory in 1938, the Organic Law of the Territory of Iowa[2] vested the judicial power of the Territory in the supreme court, district courts, probate courts, and justices of the peace. Organic Law of the Territory of Iowa, Sec.9 (1938). That instrument stated "The jurisdiction of the several courts herein provided for, both appellate and original…, shall be as limited by law: *Provided, however*, That [….] the said supreme and district courts, respectively, shall possess a chancery as well as common law jurisdiction. […] And writs of error, bills of exception, and appeals in chancery causes, shall be allowed in all cases, from the final decisions of the said district courts to the supreme court under such regulations as may be prescribed by law; [….]." Organic Law of the Territory of Iowa, § 9 (1938) (italics in original), *accord* History of Iowa, Vol.1 p.109.

---

[2] "This act of [the U.S.] Congress [establishing the Territorial Government of Iowa] constituted the Organic Law, i.e., the Constitution, of the Territory of Iowa." Documentary Material Relating to the History of Iowa, Vol. I, p.102, n.1 (Benjamin F. Shambaugh ed., 1897) (hereinafter "History of Iowa").

This provision contemplated that the original and appellate jurisdiction of the Iowa courts could generally be "limited by law", but directed that certain specific matters be insulated and protected against limitation, including: (1) that the supreme and district courts "shall possess a chancery as well as common law jurisdiction"; and (2) that "writs of error, bills of exception, and appeals in chancery causes, shall be allowed in all cases, from the final decisions of the said district courts to the supreme court" (e.g., providing a right of review from district court final judgments "in all cases" to the supreme court) "under such regulations as may be prescribed by law". That instrument, in specifically reserving from the power to "limit[] by law" the Supreme Court's jurisdiction and substituting in its stead only the authority to prescribe "regulations" "under" which the right of review from final district court judgments (guaranteed "in all cases") may be exercised – makes clear that only *reasonable* regulations concerning the manner of seeking review (and not

extinguishment of the *right* of review from final judgment in all cases) were permissible.

These matters were then effectively incorporated into the Iowa Constitutions of 1844, 1846, and 1857, though perhaps in less explicit terms than used in the Organic Law. The 1857 Constitution (in language similar but not identical to the 1944 and 1946 Constitutions), stated as follows:

> The Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a Court for the correction of errors at law, under such restrictions as the General Assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior Judicial tribunals throughout the State.

Iowa Const. art. V § 4 (1857). See also Iowa Const. Art. 6, §§ 2-3 (1844) (never ratified); Iowa Const. Art. 6, § 3 (1846).

This language in the Iowa Constitution incorporates certain key guarantees which had also existed under its predecessor, the Organic Law of the Territory of Iowa: it protects both the chancery and common law jurisdiction of the Supreme Court, provides that the Supreme Court be a court of

error correction (e.g., a court for the correction of lower court error) in non-chancery cases, endows the Supreme Court with supervisory responsibility over lower courts, and provides the Supreme Court the power to issue any "writs" or process to "secure justice to parties" in connection with its supervisory responsibility over lower courts.

In this way, the Iowa Constitution designates the Supreme Court a court of correction (with both the power and duty to correct lower court errors) in non-chancery cases; and the qualifying language "under such restrictions as the General Assembly may, by law, prescribe" authorizes *reasonable* legislative regulation of the *manner* of obtaining review of lower court errors but does not allow legislative extinguishment of the right of such review or of the Supreme Court's jurisdiction over such review. See also Root v. Toney, 841 N.W.2d 83, 87 (Iowa 2013), as corrected (Dec. 17, 2013) (discussing "limited role" of the legislature in the appellate process, which includes an ability to "set terms and conditions

for appeal", including "the power to prescribe by statute the time allowed to file an appeal and to provide for a one-day extension when the deadline falls on a day our clerk of court is closed in whole or in part") (quotation marks omitted).

Defendant's view is also supported by the Iowa Constitution's conferral upon the Supreme Court of the inherent (and unqualified[3]) power to issue "all writs and process necessary to secure justice to parties". Iowa Const. art. V § 4. Under language in Article I section 21 of the Wisconsin Constitution stating "Writs of error shall never be prohibited by law," the Wisconsin Supreme Court has held there exists a state constitutional right of appeal in criminal cases which were reviewable by writ at the time of the adoption of the Wisconsin Constitution in 1848. Scheid v. State, 211 N.W.2d 458, 462 (Wis. 1973) (per curiam), *overruled on other grounds* by State v. Van Duyse, 224 N.W.2d 603 (Wis.

---

3. As noted above, this conferral of power is not qualified by the phrase "under such restrictions as the general assembly may, by law, prescribe." Iowa Const. art. V § 4.

1975); See also Aetna Accident & Liab. Co. v. Lyman, 144 N.W. 278, 279-280 (Wis. 1913) (Such constitutional provision "manifestly was intended to preserve the right to issue the writ as it existed in the territory of Wisconsin when the Constitution was adopted"; and "At the time of the adoption of the Constitution, the judicial method by which the Supreme Court reviewed judgments in actions at law was by writ of error….").

While identical language is not included within the Iowa Constitution, the same effect is given by Article V section 4's conferral on the Iowa Supreme Court of the "power to issue all writs and process necessary to secure justice to parties", without legislative restriction or prescription. Iowa Const. Art. V § 4 (1857); See also Iowa Const. Art. 6 § 3 (1846) (similar). Our Iowa Supreme Court has recognized that Article V section 4 confers upon it the inherent power, independent of statute, "to issue all the common-law writs, including the writ of prohibition." State ex rel. O'Connor v.

Dist. Court In & For Shelby Cty., 260 N.W. 73, 78 (Iowa 1935). See also Id. at 76 (quoting Mr. Justice Deemer's "Iowa Pleading and Practice" at Vol.2, sec.1107: "It is doubtful if the legislature has authority to deprive a court of its right to issue the writs and processes necessary to secure justice or of the exercise of its supervisory control over inferior judicial tribunals. It was held by the Supreme Court of Wisconsin that the legislature had no such power, even over the circuit or district courts. If, then, the legislature cannot, by direct action, deprive the courts of their inherent power to issue common law writs necessary to the exercise of their jurisdiction, it surely will not be held that legislative inaction amounts to a denial of this power. It must be assumed then, that our courts have the right to issue writs of prohibition.").

Crawford recognizes the Iowa Supreme Court has recited, in the context of criminal as well as civil cases, that the right of appeal is merely statutory. See e.g., State v. Olsen, 162 N.W. 781, 782 (Iowa 1917) ("The right of appeal is purely

statutory. To invoke the appellate jurisdiction of this court, the statute must be followed." Under applicable statute, appeals in criminal cases may be taken only from final judgments, and an appeal does not lie from a ruling on a motion for new trial.); Wissenberg v. Bradley, 229 N.W. 205, 209 (Iowa 1929) ("The right of appeal is not a constitutional right, and it is wholly within the power of the Legislature to grant, or deny, it in either civil or criminal cases.").

Crawford urges that – at least in the context of criminal convictions for indictable offenses – what is actually meant by such references is not that the legislature can wholly extinguish the defendant's ability to obtain review of the conviction as a matter of right, but rather that all litigants must follow the legislature's reasonable statutorily prescribed requirements (such as time limitations for filing a notice of appeal, proper assembly of the record, etc.) to obtain such review – that is, to invoke the *authority* of the Supreme Court. See e.g., Schrier v. State, 573 N.W.2d 242, 244–45 (Iowa 1997)

("Once again we are confronted with confusion over the distinction between subject matter jurisdiction and authority. Where the court has subject matter jurisdiction but for some other reason cannot hear the case, the court lacks authority. This is sometimes referred to as 'lack of jurisdiction of the case.' A court lacks authority to hear a particular case where a party fails to follow the statutory procedures for invoking the court's authority.") (citations omitted); Matejski, 419 N.W.2d at 577 (Iowa courts' jurisdiction is conferred by statute; while legislature can reasonably prescribe the *manner* of its exercise, it cannot *deprive* the courts of their constitutionally conferred jurisdiction).

Indeed, it appears that the Iowa Legislature has always (until the 2019 Senate File 589 amendment) afforded to Iowa criminal defendants a non-discretionary right of review for correction of error by the Iowa Supreme Court or Court of Appeals, upon final judgments of conviction for indictable offenses. See e.g., Iowa Code ch. Courts, §§ 76–77, p. 124

(Terr. 1839) (writ of error review as matter of course for criminal defendants); Iowa Code ch. 47, §§ 76–77 (Terr. 1843) (same); §§ 3088, 3090–91 (1851) (same); Iowa Code § 4529 (1873) (criminal decisions of district court reviewable to Supreme Court); Iowa Code § 9559 (1919) (same); Iowa Code §§ 13607, 13994 (1924) (entitlement to supreme court review by appeal, for both indictable and non-indictable offenses); Iowa Code § 762.51, 793.1 (1966) (same); Iowa Code § 793.1 (1973) (right of appeal to supreme court in indictable criminal cases); Iowa Code § 814.6 (1979) (right of appeal from all final judgments of sentence, but only discretionary review for simple-misdemeanor convictions and ordinance-violations). While a similar entitlement to review as of right to the Supreme Court or Court of appeals has not always been extended for non-indictable offenses (e.g., simple

misdemeanors and ordinance violations)[4], the Iowa Constitution has historically contemplated that such non-indictable offenses (originally subject to disposition by justices of the peace) receive only a right of appeal to the District Court rather than a right of review by the Supreme Court (or Court of Appeals) for correction of lower court error. See e.g., Iowa Const. art. I § 11 (1857) ("All offenses less than felony and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a Justice of the Peace, or other officer authorized by law... without indictment...., saving to the defendant the right of appeal").

Both constitutionally and statutorily, our Supreme Court (and the Court of Appeals) is "a court for the correction of

---

4. See e.g., 1972 Iowa Acts, ch. 1124, §§ 73.1, 275, 282 (64th Gen. Assem., 2nd Sess.) (amending Iowa Code § 793.1 to provide conviction for non-indictable misdemeanor cannot be appealed to supreme court except by discretionary review); Iowa Code § 814.6 (1979) (similarly excepting simple misdemeanors and ordinance violations from general right of appeal from final judgments of sentence).

errors at law." Iowa Const. Art I § 4; Iowa Code §§ 602.4102, 602.5103 (2019). By seeking to divest Iowa's appellate courts of their ability to decide ineffective assistance of counsel claims on direct appeal, Senate File 589 improperly intrudes upon the inherent role, Jurisdiction, and duty of the Iowa Supreme Court, as well as the inherent right of review for correction of legal errors that is conferred on convicted criminal defendants under the Iowa Constitution.

Furthermore, by removing consideration of constitutional claims of ineffective assistance from the realm of direct appeal, even where the *appellate court's judgment* is that the direct appeal record establishes the violation, Senate File 589 intrudes on Iowa appellate courts' independent role in interpreting the constitution and protecting Iowans' constitutional rights. See State v. Abrahamson, 696 N.W.2d 589, 593 (Iowa 2005) (judgment exercised "must be that of the court – not the sheriff").

B. Equal Protection

The State cites no authority for its claim that failure to identify a particular standard of review mandates a finding of waiver. State's Brief p. 28. To the contrary, when the scope of review is well-settled, nothing in the failure to identify the standard of review requires this Court to "assume a partisan role and undertake the [party's] research and advocacy." State v. Stoen, 596 N.W.2d 504, 507 (Iowa 1999). As indicated above, Crawford does not dispute the well-settled notion that constitutional claims are reviewed de novo. State v. Milner, 571 N.W.2d 7, 12 (Iowa 1997). Given that Crawford agrees with the State as to the appropriate standard of review, any "waiver" of argument regarding the standard is meaningless.

Where Crawford disagrees with the State is in its contention that Crawford's position would equate unpreserved error with preserved error and overrule Strickland v. Washington, 446 U.S. 668 (1984). It is helpful to remember

the limited nature of Crawford's claim. Crawford is claiming that he should not be treated differently than another defendant making a similar sufficiency-of-the-evidence challenge solely because his attorney failed to provide effective assistance. In both circumstances, the factual record has been made and the appellate court simply has to determine whether that record supports the legal elements for conviction. State v. Truesdell, 679 N.W.2d 611, 616 (Iowa 2004).

Furthermore, the remedy Crawford seeks is no different than the remedy already provided for under pre-SF589 case law – dismissal of the conviction regardless of whether the sufficiency challenge was properly preserved. Id. The State's concerns are misdirected.

C. Due Process

Admittedly, the United States Supreme Court has stated appellate review is not a necessary element of federal due process. McKane v. Durston, 153 U.S. 684, 687–88 (1894). However, these conclusions are subject to much criticism.

See e.g., Cassandra Burke Robinson, The Right to Appeal, 91 N.C. L. Rev. 1219, 1221 (2013); Marc M. Arkin, Rethinking the Constitutional Right to an Appeal, 39 UCLA L. Rev. 503 (1992); Alex S. Ellerson, The Right of Appeal and Appellate Procedural Reform, 91 Columbia L. Rev. 373, 376 (1991).

After McKane, the U.S. Supreme Court has suggested there may be a right of appeal under the due process clause: "As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this court, the right of appeal is not essential to due process, *provided that due process has already been accorded in the tribunal of first instance*." State v. Ohio ex. rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 80 (1930) (emphasis added). "Because it is impossible to be sure that due process was accorded at the trial level without actually reviewing the trial proceedings, an appeal is essential to ensure that due process is accorded to each criminal defendant." Alex S. Ellerson, The Right of Appeal and

Appellate Procedural Reform, 91 Columbia L. Rev. 373, 378 (1991).

Indeed, approximately 90 years after McKane, in 1983, Justice Brennan believed if the court were squarely faced with the issue it would hold that federal due process requires a right to appeal a criminal conviction:

> [T]he reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction. Of course, a case presenting this question is unlikely to arise, for the very reason that a right of appeal is now universal for all significant criminal convictions.

Jones v. Barnes, 463 U.S. 745, 756 n. 1 (1983) (Brennan, J., dissenting).

Appellate review has become "a fundamental element of procedural fairness as generally understood in this country.'" Harlon Leigh Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 66 (1985) (quoting ABA Comm. On Standards of Judicial Administration: Standards Relating to Appellate Courts § 3.10, at 12 (1977)). See also Griffin v.

Illinois, 351 U.S. 12, 18 (1956); Suzuki v. Quisenberry, 411 F. Supp. 113, 1133 (D. Haw. 1986). Criminal defendants in the federal system and almost all states have a right to directly appeal their convictions and sentences. See Gregory M. Dyer, Criminal Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain, 65 Notre Dame L. Rev. 649, 651 (1990); Rosanna Cavallaro, Better Off Dead: Abatement, Innocence, and the Evolving Right of Appeal, 72 U. Colo. L. Rev. 943, 986 (2002). The right of appeal and what it ensures - fairness and a just criminal conviction and sentence – reflect fundamental values in American and Iowa society and the criminal justice system. This Court should recognize a constitutional right of direct appeal under federal and state due process protections.

Finally, the effective assistance of counsel in state criminal proceedings is a requirement of due process. Reece v. Georgia, 350 U.S. 85, 90 (1955). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but

because of the effect it has on the ability of the accused to receive a fair trial." United States v. Cronic, 466 U.S. 648, 658 (1984). It stands to reason that denying a defendant direct appellate review of his claim of ineffective assistance of counsel – for the sole reason that the defendant is claiming the denial of effective assistance of counsel – likewise deprives the defendant of due process.

CONCLUSION

For all of the reasons discussed above and in his Brief and Argument Defendant-Appellant Randy Crawford respectfully requests this Court vacate his conviction, sentence and judgment for Failure to Affix a Drug Tax Stamp and remand his case to the District Court for dismissal of the charge.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.00, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 5,035 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theresa R. Wilson Dated: *7/20/20*

THERESA R. WILSON
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us